Supreme Court, U. S.
FILED
APR 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1567

BERNARD A. HORTON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE W. REESE
Attorney for Petitioner
1802 Broadway
New Orleans, Louisiana 70118
(Telephone [504] 866-2703)

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

Page

Table of Authorities i

Jurisdiction 2

Only Question Presented For Review By This Petition 2

Statement of the Case 3

Argument 3

Conclusion 7

Certificate 7

Appendices 1a

TABLE OF AUTHORITIES

CASES:

Camp v. U. S., 413 F2d 419 (5th Cir. 1969) 5

Labat v. Bennett, 365 F2d 698 (5th Cir. 1966) 4

Thiel v. Southern Pacific Co., 328 U.S. 217, 66 S.Ct. 984 (1946) 4

STATUTES:

28 U.S. Code 1861 through 1869 2,5,6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

BERNARD A. HORTON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE WARREN BURGER AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Bernard A. Horton, hereinafter sometimes referred to as "Defendant" or "Appellant" respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit to review and reverse a judgment of conviction and a sentence for a violation of Section 7206(1) of Title 26, U.S. Code.

APPENDICES

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit, dated February 5, 1976, attached hereto and marked "Appendix A".

A copy of the judgment of the United States District Court, dated February 12, 1976, attached hereto and marked "Appendix B".

A copy of the Order of the United States Court of Appeals for the Fifth Circuit, dated August 12, 1975, attached hereto and marked "Appendix C".

Appendix D includes the first five pages of the Random Jury Selection Plan, together with the final two pages.

JURISDICTION

Jurisdiction is conferred on this Court by Section 7206(1) of Title 26, U.S. Code.

The judgment of the Court of Appeals for the Fifth Circuit was rendered on February 5, 1976, and application for rehearing denied on March 8, 1976.

ONLY QUESTION PRESENTED FOR REVIEW BY THIS PETITION

Whether the Random Jury Selection Plan for the United States District Court, Eastern District of Louisiana violates Sections 1861 through 1869 of Title 28 of the United States Code and the Sixth Amendment

to the Constitution of the United States in granting excuses from jury duty to "Persons actively engaged in the operation of a one-man business." See Appendix D, page 21a. Appendix D includes the first five pages of the Plan, together with the final two pages.

STATEMENT OF THE CASE

Defendant, Bernard A. Horton, was indicted by a grand jury and convicted by a petit jury, all of the members of which were selected in accordance with the Random Selection Plan for the United States District Court, Eastern District of Louisiana and approved by the Fifth Circuit Court of Appeals.

This plan authorizes the excusal of "Persons actively engaged in the operation of a one-man business". Appendix D, page 21a.

Petitioner attacked the Plan in the lower Court as violative of the United States Constitution and Sections 1861 through 1869 of Title 28 of the United States Code, but his conviction was upheld by the Fifth Circuit Court of Appeals.

ARGUMENT

Petitioner, in addition to being in disagreement with the verdict in this case, applies for this writ because the question presented cries for decision at the highest level of legal and constitutional interpretation. The question, baldly stated, is whether or not discrimination in criminal cases can only be recognized when it

operates against the lowly, the wage-earner or the weak.

Petitioner is a lawyer, a "sole proprietor" of his business. Historically, he and his peers did not require the judicial protection so acutely needed by the poor, the wage-earner or the black.

A series of enlightened rules, too well known to require citation, ensure no defendant will be deprived of a panel of his peers if he is black, if she is female, if he is poor, if he is a wage-earner. Under the Plan under attack here, a defendant may only suffer this deprivation if he belongs to a somewhat faceless class identified as "persons actively engaged in the operation of a one-man business".

Certainly, if the class granted excuses were wage-earners, regardless of the hardship on the wage-earner, the Plan would be invalid legally or constitutionally, for state or federal, grand or petit jurors. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 66 S.Ct. 984 (1946); *Labat v. Bennett*, 365 F2d 698 (5th Cir. 1966).

The only logical distinction possible between "wage-earners" and "sole proprietors" could be their numbers.

The Appeals Court relies heavily on the fact that the excusal of sole proprietors is not automatic. The excusals of wage-earners in *Thiel* and *Labat* are not automatic excusals cases either. Those opinions and others recognize the obvious fact that jury duty is an

onerous burden of citizenship and those who may, will avoid it. Your petitioner and our government are entitled to their services.

The Appeals Court relied on *Camp v. U.S.*, 413 F2d 419 (5th Cir. 1969), where registration lists were approved over the objection that all persons were not required to register. Petitioner has doubts about the validity of *Camp* in view of other opinions, but it is not necessary to contradict *Camp*. Persons who choose not to register to vote cannot be identified by color, sex, age, class or economic stratum. Sole proprietors can.

The Appeals Court also relied on the recognized rule that "the categorical exclusion of certain occupational groups from jury duty is permissible on the bona fide ground that it [is] *for the good of the community* that their regular work should not be interrupted.' " (Emphasis ours) Citing cases. Petitioner agrees that this is the rule.

Two questions. First, are sole proprietors a "certain" occupational group? Answer — obviously not. Second, is the sole proprietor excuse granted "for the good of the community?" Answer — probably not, on its face it appears to be granted for individual convenience.

In the same Plan, other excuses are validly enumerated — doctors, attorneys at law, dentists, ministers. It's true that the rule is embodied in Section 1863, Title 28 that "any class or group of persons may, for the public interest, be excluded . . .", but, again, the public interest is the issue.

The disruption of the public interest is difficult to identify when a citizen is required to serve the judicial system for a few days every year or two and we discover he or she is an accountant, abstractor, acoustical consultant, actuary, adjuster, advertising agent, air conditioning repairman, etc. or a contractor in a thousand different specialties or a proprietor of a thousand different specialties or a proprietor of a thousand different types of retail outlets or service industries.

Petitioner was entitled to be indicted and tried by jurors from the backbone of America. The vertebrae, as groups, may be wage-earners, corporate executives, welfare recipients, educators and many others. But, to exclude the contractors, the professionals, the owners of small businesses leaves a vertebral gap that is crippling to the American judicial system.

Finally, the Plan is clearly violative of Section 1862, Title 28 of the United States Code which prevents discrimination due to "economic status." While no group in America has the same economic status within itself, probably no group is closer to an average than sole proprietors.

While not legally essential to this argument, petitioner notes that he does belong to the group which has been excused from jury duty under the plan.

CONCLUSION

For the foregoing reasons, we pray, for certiorari, reversal and remand.

Respectfully Submitted,

GEORGE W. REESE
Attorney for Petitioner
1802 Broadway
New Orleans, Louisiana 70118
Telephone (504) 866-2703

CERTIFICATE

I hereby certify that a copy of this petition has been mailed, postage prepaid, by U.S. Mail, to the Solicitor General of the United States, Department of Justice, Washington, D.C., and that a copy has been mailed, postage prepaid, by U.S. Mail, to the United States Attorney for the Eastern District of Louisiana, 500 St. Louis Street, New Orleans, Louisiana, this ____ day of April, 1976.

GEORGE W. REESE

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bernard A. HORTON,
Defendant-Appellant.

No. 75-1530.

United States Court of Appeals,
Fifth Circuit.

Feb. 5, 1976.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, SIMPSON and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge:

Appellant Bernard Horton was convicted by a jury of willfully and knowingly subscribing false income tax returns for the years 1968, 1969, and 1970. *See* 26 U.S.C. § 7206(1). Appellant's conviction followed from his understating on his returns for the years in question his gross receipts from the practice of law. The present appeal challenges that conviction on three grounds. We reject appellant's contentions and affirm his conviction.

In response to appellant's request pursuant to F.R.Cr.P. 7(f) for a bill of particulars, the Government

stated that it intended to establish appellant's guilt by the "specific item" method of proof. Appellant now challenges the Government's later introduction — in Schedule VI and through the testimony of expert summary witness Rotolo — of evidence as to his total bank deposits in 1968, 1969, and 1970. He argues that introduction of this evidence created a fatal variance between the Government's asserted method of proof set out in the bill of particulars and the proof at trial and, more specifically, that evidence of total bank deposits is admissible only where the Government proceeds under the "net worth" theory. To be contrasted with the specific item method of proof, the net worth method hinges on a proven increase in the taxpayer's net worth during the period in question in an amount greater than that reported to IRS with the consequent implication of unreported income. *See, e.g., United States v. Meriwether*, 440 F.2d 753 (5th Cir. 1971), *cert. denied*, 417 U.S. 948, 94 S.Ct. 3074, 41 L.Ed.2d 668 (1974). The net worth method generates a circumstantial case laden with possibilities for error and is, in turn, circumscribed in its use by a number of limiting rules. *See Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *Merritt v. United States*, 327 F.2d 820 (5th Cir. 1964). For example, the Government must establish opening net worth with reasonable certainty and must investigate and show false leads furnished by the taxpayer. *E.g., Holland v. United States*, 348 U.S. at 135-36, 75 S.Ct. at 135; *Agoranos v. United States*, 409 F.2d 833, 835 (5th Cir. 1969); *Merritt v. United States, supra* at 822-23.

The specific item method is, however, direct in its operation. The usual strategy with the latter method is

for the Government to produce evidence of the receipt of specific items of reportable income by the defendant that do not appear on his income tax return or appear in diminished amount. *United States v. Goldstein*, 56 F.R.D. 52, 55 n.8 (D.Del. 1972); *see Azcona v. United States*, 257 F.2d 462 (5th Cir. 1958); *Lloyd v. United States*, 226 F.2d 9 (5th Cir. 1955). Appellant Horton's prosecution presents a good example of the specific item method of proof in income tax cases. Horton was a lawyer in New Orleans with an extensive criminal defense practice. Agents of IRS, working from records supplied by appellant and from records in the local court clerk's office that showed those cases in which appellant was attorney of record, derived the names of a large number of clients represented by Horton during 1968, 1969, and 1970. The agents then determined through a lengthy process of interviews the amounts paid to appellant as legal fees by those clients in the above years. Unfortunately for appellant, the amounts his clients were willing to testify to exceeded the amounts of gross receipts stated on his income tax returns. Relying on the testimony of appellant's clients, the Government successfully built its case and obtained a conviction.

We reject appellant's argument that use of evidence of total bank deposits created a fatal variance. In this appeal, as was the case at trial, the Government argues that evidence of total bank deposits was properly admissible in corroboration of the testimony of appellant's former clients as to amounts paid him in 1968, 1969, and 1970. Many of the former clients called by the Government possessed no documents or receipts to substantiate their claims of payment to appellant. The Government contends, correctly, that

the evidence of total bank deposits corroborated this unsupported testimony as to the fact of payment. The corroborative feature of the bank deposits evidence proceeds apace with the implication that appellant handled and expended large sums of money, as would be expected if the specific item testimony were true. *See United States v. McGuire*, 347 F.2d 99 (6th Cir. 1965), *cert. denied*, 382 U.S. 826, 86 S.Ct. 59, 15 L.Ed.2d 71 (1966); *McKenna v. United States*, 232 F.2d 431, 436-37 (8th Cir. 1956); *United States v. Nunan*, 236 F.2d 576, 588 (2d Cir. 1956), *cert. denied*, 353 U.S. 912, 77 S.Ct. 661, 1 L.Ed.2d 665 (1957). For this reason, appellant's fatal variance argument is inapposite. The evidence of total bank deposits during the years in question was properly admissible as corroborative evidence in this specific item prosecution and there was *no* variance.

Assuming for the purposes of argument only, however, that a variance did exist between the method of proof designated in the bill of particulars and the Government's introduction of the total bank deposits evidence, appellant has still failed to demonstrate that the variance was fatal to the Government's case. The purpose of the bill of particulars is to apprise the defendant of the charges against him with sufficient precision to enable him to prepare his defense, *e.g.*, *United States v. Bearden*, 423 F.2d 805 (5th Cir. 1970), *cert. denied*, 400 U.S. 836, 91 S.Ct. 73, 27 L.Ed.2d 68 (1971), and this purpose is particularly well-served in complicated income tax prosecutions like the instant one. The usual manner in which questions as to bills of particulars reach this Court is on review of a district court's denial of a defendant's request for the bill. In such cases, the standard of review is one of discretion; viz., did the district court abuse its discretion? *See*,

e.g., *Buie v. United States*, 420 F.2d 1207 (5th Cir. 1969), *cert. denied*, 398 U.S. 932, 90 S.Ct. 1830, 26 L.Ed.2d 97 (1970); *Joseph v. United States*, 343 F.2d 755 (5th Cir. 1965), *cert. denied*, 382 U.S. 828, 86 S.Ct. 65, 15 L.Ed.2d 73 (1966). In the instant situation, where a fatal variance is argued, appellant must demonstrate that he was taken by surprise by reason of the variance and that such surprise prejudiced the preparation of his defense. *See United States v. Glaze*, 313 F.2d 757 (2d Cir. 1963); *cf. Buie v. United States, supra*. Appellant Horton has not made and cannot make the requisite demonstration. As early as the first day of trial, the Government stated and defendant acknowledged in their respective opening remarks that bank statements and other documents connected with four basic bank accounts used by appellant and his wife would be introduced and analyzed. First Supplemental Record on Appeal, Vol. I at 7, 15. Appellant cannot argue that the evidence of total bank deposits unreasonably impeded the adequate preparation of his defense by reason of surprise.

Appellant also challenges the refusal of the district court to give the jury an instruction limiting its consideration of the total bank deposits evidence to corroboration of the specific item testimony. The district court relied on *Azcona v. United States, supra*, to support its denial of the requested instruction. This was error. The *Azcona* opinion dealt with a district court's denial of an additional bill of particulars in a specific item prosecution; it did not address the problem of a limiting instruction on corroborative evidence. We hold that the district court erred in refusing the requested instruction. However, we also find the error to be harmless under the facts of the instant case. The

evidence against appellant was overwhelming, and the bank deposits evidence was but an insignificant portion of the Government's total case. Moreover, the colloquy that occurred between the Government, the defense attorney, and the bench in the presence of the jury when defense counsel objected to the introduction of this evidence served as the functional equivalent of a limiting instruction.

GOVERNMENT: Your Honor, we tender this schedule into evidence as corroborative evidence, not to be added to Exhibits 1 through 5 previously admitted, but as separate corroborative evidence to show the availability of cash as testified to by witnesses who have testified previously.

DEFENSE: I object to the introduction of all of this evidence as far as Schedule VI is concerned, Your Honor.

THE COURT: Objection overruled; let it be admitted.

GOVERNMENT:

Q Would you give us the total amounts shown on your schedules for the period we are concerned with, Mr. Rotolo?

A In 1968 the total deposits amounted to $31,-511.80; in 1969, $52,499.25; in 1970, $43,835.99.

Q Now, did you prepare another schedule in connection with all the preceding schedules?

A Yes, sir. That's G-VII, I believe.

Q Would you identify that for us please?

THE COURT: Let me ask you first: These amounts the witness has mentioned as being total deposits, is it the government's contention that they represent the gross receipts on the books?

GOVERNMENT: No, Your Honor. Those figures are only in corroboration of the witnesses who have testified.

THE COURT: In 1970, for example, the understatement alleged here was $9,199.

THE WITNESS: That's inclusive of all the sources we used, Your Honor.

THE COURT: What?

GOVERNMENT: In other words, Your Honor, we have introduced evidence of four types of sources to indicate that $9,000 amount.

One of the important sources of that was the testimony of witnesses, who did not have receipts any longer that they paid, and we have intended to show, by this corroborative evidence, that there were bank deposits in this year of amounts which will justify belief in those witnesses that what they paid was received and deposited.

DEFENSE: And I have objected on the grounds that I previously stated, Your Honor.

THE COURT: I just don't want the jury to get the impression that this is an addition to the $9,000 already mentioned.

GOVERNMENT: Oh, no, sir.

THE COURT: All right; go ahead.

DEFENSE: Your Honor, also because of my previous objection to Government Exhibit VI, on the bank deposits, I also want to interpose an objection to Exhibit VII, where these figures are carried over in an attempt to summarize the figures, which I don't think is proper.

THE COURT: Objection overruled. Go ahead.

Second Supplemental Record on Appeal, Vol. I at 1062-64. Accordingly, the district court's refusal to give the limiting instruction was harmless error. *See Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *United States v. Harbolt*, 491 F.2d 78 (5th Cir. 1974).

As a second point of error, appellant attacks the Government's use of prior statements by appellant's clients, given to IRS agents at the time of their investigation, to refresh the memories of those witnesses at the time of trial. Appellant's contention is answered by this Court's opinion in *Esperti v. United States*, 406 F.2d 148, 150-51 (5th Cir.), *cert. denied*, *Farinella v. United States*, 394 U.S. 1000, 89 S.Ct. 1591, 22 L.Ed.2d 777 (1969).

> It is hornbook law that any writing may be used to refresh the recollection of a witness. See Wigmore, Evidence § 758. This is true even where the document itself would be inadmissible as evidence. *Williams v. United States*, 7 Cir. 1966, 365 F.2d 21. Caution must be exercised to insure that the document is actually being used for purposes of refreshing and not for purposes of putting words into the mouth of the witness. Such, however, is within the discretion of the trial judge.

See Redfearn v. United States, 375 F.2d 767 (5th Cir. 1967). It must be borne in mind that the reliability and credibility of witnesses is a matter for the trier of fact — here, the jury. *See Thompson v. United States*, 342 F.2d 137 (5th Cir.), *cert. denied*, 381 U.S. 926, 85 S.Ct. 1560, 14 L.Ed.2d 685 (1965). Moreover, where the issue, as here, is one of present recollection revived, the doctrine of contemporaneity has little application. *See Putnam v. United States*, 162 U.S. 687, 16 S.Ct. 923, 40 L.Ed. 1118 (1895). We perceive no abuse of discretion in the district court allowing the Government to refresh the witnesses' memories with their prior statements to IRS agents.

As a final point of error, appellant challenges that portion of the Plan for Random Selection of Grand and Petit Jurors for the Eastern District of Louisiana which excuses operators of "one-man" businesses from jury duty upon request. We reject appellant's argument. In the first instance, the exclusion of sole proprietors is not automatic. On the contrary, it is necessary for such persons to request that they be excused from jury duty. This element of choice makes the present case analogous to that before the Court in

Camp v. United States, 413 F.2d 419 (5th Cir. 1969), where the use of voter registration lists to compile a roster of potential jurors was approved. As the Court stated in *Camp*, persons choosing not to register to vote do not constitute a cognizable class capable of systematic exclusion from juries. 413 F.2d at 421. Likewise, sole proprietors requesting to be excused from juries in the Eastern District of Louisiana do not constitute a cognizable class systematically excluded from petit juries. *See Labat v. Bennet*, 365 F.2d 698 (5th Cir. 1966); *cf. Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Curry v. Estelle*, 524 F.2d 981 (5th Cir. 1975). The categorical exclusion of certain occupational groups from jury duty is permissible on the "bona fide ground that it [is] for the good of the community that their regular work should not be interrupted." *Government of the Canal Zone v. Scott*, 502 F.2d 566, 569 (5th Cir. 1974), *quoting* Mr. Justice Holmes in *Rawlins v. Georgia*, 201 U.S. 638, 640, 26 S.Ct. 560, 561, 50 L.Ed. 899 (1906). The exclusion of sole proprietors upon request meets that standard.

The judgment of conviction in the instant case is in all respects affirmed.

APPENDIX B

THE UNITED STATES

v.

BERNARD A. HORTON — 3 Counts
715 Topaz St.
New Orleans, La. 70124

INDICTMENT: 26 USC 7206(1)
False statement on tax returns

WED. FEB. 12, 1975

2 PM

1.

RE-SENTENCING (3 COUNTS)

DEFT PRESENT

COURT AMENDS SENTENCE TO READ AS FOLLOWS:

AS TO COUNT ONE ONLY:

DEFT IS COMMITTED TO THE CUSTODY OF THE ATTY GEN FOR A PERIOD OF 2 YEARS, 6 MONTHS OF WHICH HE IS TO SERVE IN A JAIL TYPE INSTITUTION AND THE BALANCE TO BE SUSPENDED AFTER WHICH THE DEFT TO BE PLACED ON PROBATION FOR A PERIOD OF 2 YEARS.

IT IS FURTHER ORDERED THAT AS A SPECIAL PROVISION OF PROBATION, THE DEFT PAY THE FEDERAL INCOME TAX HE OWES DURING THE PERIOD OF HIS PROBATION.

AS TO COUNTS 2 AND 3 ONLY:

THE SAME SENTENCE IMPOSED ON COUNTS 2 AND 3, TO RUN CONCURRENTLY WITH THE SENTENCE IMPOSED ON COUNT 1.

DEFT RELEASED ON HIS SAME BOND PENDING APPEAL.

DATE OF ENTRY FEB 13, 1975

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1530

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

BERNARD A. HORTON,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ORDER:

IT IS ORDERED that appellant's motion for leave to proceed on the original typewritten record and typewritten brief is granted.

/s/ CHARLES CLARK
UNITED STATES
CIRCUIT JUDGE

APPENDIX D

United States District Court
Eastern District of Louisiana

PLAN FOR RANDOM SELECTION OF GRAND AND PETIT JURORS PURSUANT TO THE JURY SELECTION AND SERVICE ACT OF 1968

Filed: Dec. 20, 1972

The plan heretofore adopted by this Court for the random selection of grand and petit jurors pursuant to the Jury Selection and Service Act of 1968, Title 28, United States Code, Sections 1861, et seq., approved by the Judicial Council of the United States Court of Appeals for the Fifth Circuit and filed on April 16, 1972 is, subject to the approval of the Reviewing Panel for the Fifth Circuit, and to such rules and regulations as may be adopted from time to time by the Judicial Conference of the United States, hereby revoked and rescinded, and the following plan, which incorporates the revisions required by Public Law 92-269, April 6, 1972, is hereby adopted.

APPLICABILITY OF PLAN

This plan is applicable to the Eastern District of Louisiana which comprises thirteen (13) parishes, to which nine (9) judgeships are authorized and regularly assigned.

POLICY

It is the policy of the United States and of this Court that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the District wherein the Court convenes. It is further the policy of the United States and of this Court that all citizens shall have the opportunity to be considered for service on grand and petit juries in the District Courts of the United States and shall have an obligation to serve as jurors when summoned for that purpose.

DISCRIMINATION PROHIBITED

No citizen shall be excluded from service as a grand or petit juror in the District Courts of the United States on account of race, color, religion, sex, national origin, or economic status.

MANAGEMENT AND SUPERVISION OF JURY SELECTION PROCESS

A Jury Commission is hereby established for this District. The Jury Commission shall consist of the Clerk, or a duly qualified Deputy Clerk designated by the Clerk, and a Citizen Jury Commissioner to be designated by the Court. The Citizen Jury Commissioner shall not belong to the same political party as the Clerk, or designated Deputy Clerk, serving with him. The Citizen Jury Commissioner shall reside, during his tenure in office, in the Eastern District of Louisiana. The Citizen Jury Commissioner shall

receive compensation at the rate of $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement, under standards provided by law, for travel, subsistence, and other necessary expenses incurred by him in the performance of his duties.

The Jury Commission shall act under the supervision and control of the Chief Judge who is charged with the overall supervision of this plan, provided however that the Chief Judge may, from time to time, by order duly filed in the Clerk's Office, designate a specific judge who is assigned to supervise the day to day operation of this plan. The words "Chief Judge" wherever used in this plan shall mean the Chief Judge of this District, or in the event of his absence, disability, or inability to act, the active District Judge who is present in the District and has been in service the greatest length of time. The word "Court" as used herein, unless otherwise specifically indicated, shall mean the Chief Judge of this District or such other District Judge as the Chief Judge has, by order, in accordance with this plan, designated to supervise the operation of this plan.

RANDOM SELECTION FROM VOTER REGISTRATION LISTS

Voter registration lists, including any and all federal registrars' lists, represent a fair cross section of the community in the Eastern District of Louisiana. This Court is of the opinion that the rights of all citizens are substantially protected by the use of such lists as the source of selection of prospective jurors, therefore no other source is proposed. Accordingly,

the names of all prospective grand and petit jurors serving on or after the effective date of this plan shall be selected at random in accordance with the procedures hereinafter set forth from such voter registration lists of all of the parishes within this District. This plan is based on the conclusion and judgment that the policy, purpose and intent of the Jury Selection and Service Act of 1968 will be fully accomplished and implemented by the use of voter registration lists, as supplemented by the inclusion of subsequent registrants to the latest practicable date, as the source of an at random selection of prospective grand and petit jurors who represent a fair cross section of the community. This determination is supported by all of the information this Court has been able to obtain after diligent effort on its part and after full consultation with the Fifth Circuit Jury Working Committee and the Judicial Council of the Fifth Circuit.

As required by the Judicial Conference of the United States, a report will be made to the Administrative Office of the United States Courts within six months after each periodic refilling of the master jury wheel, on forms approved by the Judicial Conference, giving general data relating to the master jury wheel, the time and manner of name selection, the source and number of names placed in the wheel, and related information, an analysis of the race and sex of prospective jurors based on returns from 500 juror qualification forms drawn at random from the master jury wheel, and an analysis by race, sex and occupation of all persons who have actually reported for jury service during the period covered by the report.

SELECTION PROCEDURE

A master jury wheel and a qualified jury wheel shall be maintained for this District. The names of prospective jurors to be placed in the master jury wheel shall be randomly selected as hereinafter provided for from the voter registration lists of all of the parishes in the District. In selecting names from the voter registration lists a member of the Jury Commission shall select by lot a starting number from 1 to 30, and the number so selected shall designate the name of the first person selected from the voter registration list. Thereafter, every hundredth name shall be selected. This will result in the initial placement in the master jury wheel of one per cent of the total number of registered voters in the District. For example, if the starting number selected is 21, then the 21st, 121st, 221st, etc., name shall be selected until the list has been exhausted. In the future there shall be selected such other number spread as the Court shall direct in order to produce a minimum number of names in the master jury wheel of one-half of one per cent of the total number of registered voters in the District. If the lists or rolls are kept by political subdivisions, such as wards, the same procedure shall be followed as to each such subdivision, list or roll.

The names selected from the authorized sources in the manner set out above shall be typed or imprinted onto cards or slips, together with the address and an identifying number, and reference hereinafter to the placing of names or the drawing of names, etc. shall refer to the placing of such cards and the drawing of such cards, etc.

MASTER JURY WHEEL

The Jury Commission shall maintain a master jury wheel into which the names of those randomly selected from the voter registration lists shall be placed. The minimum number of names to be placed in the master jury wheel shall be not less than one half of one per cent of the total number of registered voters in the entire District.

The Chief Judge or the District Judge designated by the Chief Judge by order duly filed in the Clerk's Office to supervise the operation of this plan shall have the responsibility for ordering the placing from time to time of additional names in the master jury wheel.

The master jury wheel shall be emptied and refilled between November 7, 1972 and September 1, 1973, and thereafter, every four years between November 7 and September 1.

DRAWING OF NAMES FROM MASTER JURY WHEEL

Names shall be drawn from the master jury wheel and qualifications forms mailed, processed, etc. as follows: From time to time as directed by the Chief Judge or by the Judge designated by order of the Chief Judge to supervise the operation of this plan, the Clerk, a Deputy Clerk, or a District Judge, shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The Clerk or Jury Commission shall prepare an alphabetical list of the names drawn, which list

shall be public unless the Chief Judge or such other Judge as is designated by order of the Chief Judge to supervise the operation of this plan shall direct, in any case where the interests of justice so require, that the names be kept confidential. The Clerk or Jury Commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the Clerk or Jury Commission by mail within ten days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in the form, the Clerk or Jury Commission shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the Clerk or Jury Commission within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the Clerk or Jury Commission forthwith to appear before the Clerk or Jury Commission to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the Clerk or Jury Commission may, at the discretion of the District Court, except where his prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under Section 1871 of Title 28 U.S. Code. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of the Jury Commission or the Clerk or the Court, at which time, in such cases as it

appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the Clerk or Jury Commission may be noted on the juror qualification form and transmitted to the Chief Judge or such other District Court Judge as has been designated by order of the Chief Judge to supervise this plan.

EXCUSES ON INDIVIDUAL REQUESTS

This Court, by unanimous agreement of all of its judges, hereby finds that jury service by members of the following occupational classes or groups of persons would entail undue hardship or extreme inconvenience to the members thereof, and the excuse of such members will not be inconsistent with the objects and purposes of the Act, and shall be granted upon individual request:

(1) Persons actively engaged in the operation of a one-man business.

(2) Mothers with children under ten years of age where there is no one but the mother to take care of the children.

(3) Attorneys at law, doctors and dentists actively engaged in the practice of their profession, and ministers of the Gospel actively and regularly engaged in the discharge of their ministerial duties.

EXEMPTIONS FROM JURY SERVICE

This Court, by unanimous agreement of all of its judges, finds that the exemption of the following groups or occupational classes is in the public interest and would not be inconsistent with the Act, and accordingly members of such groups are exempt from jury service:

(1) Members in active service in the Armed Forces of the United States.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
OFFICE OF THE CLERK

Benjamin W. Reisch
Clerk

400 Royal St., Rm. 306
New Orleans, La. 70130

Dear Prospective Juror:

Your name has been selected at random from the list of registered voters for prospective jury service in this Court.

The Jury Selection and Service Act of 1968 requires that the attached questionnaire be filled out and returned to the Clerk's office within 10 days. There is enclosed for your convenience in returning the questionnaire, a self-addressed envelope which requires no postage. Failure to do this within the 10 days will make you liable to be summoned to report to this

office to execute said questionnaire, and failure, without good cause, to respond to such a summons could result in your being fined up to $100.00 or imprisoned up to 3 days in jail, or both. Misrepresentation in the questionnaire of any material fact requested, if made to secure or avoid jury service, may subject you to criminal penalties.

THIS IS NOT A SUMMONS for jury service. If you are later chosen for such service you will be notified to report at a stated time and place. Jurors will receive mileage and, unless they are Government employees, $20.00 per day for each day of service.

EXEMPTIONS — *The following persons are exempt from jury service:*

Active members of the Armed Services
Policemen and firemen.
Public officers, Federal, State, Parish or City.
Federal law enforcement officers.

EXCUSES — *The following persons will be excused by the Court upon individual request:*

Persons actively engaged in operating a one-man business.
Mothers with children under 10 years of age where there is no one else but the mother to care for them.
Lawyers, doctors, dentists and ministers of the Gospel when actively and regularly engaged in the practice of their profession.
Persons over 70 years of age.

— *The following persons may be excused by the Court upon request and a proper explanation and/or doctor's certificate:*

Persons suffering from a disabling physical disability.

Persons suffering from a disabling mental disability.
Persons who would suffer an extreme hardship if required to serve.

Before anyone may be exempted or excused, however, the questionnaire must be answered in full and returned to this office.

If you are unable to fill out this form yourself you should have someone else fill it out for you, setting out the reason for such action.

Yours very truly,

BENJAMIN W. REISCH

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

REVIEWING PANEL, JURY PLAN

The foregoing and attached Amendment to the Plan of the United States District Court for the Eastern District of Louisiana for the Random Selection of Grand and Petit Jurors having been reviewed by the Reviewing Panel of this Circuit is hereby certified as APPROVED.

Entered for the Reviewing Panel at New Orleans, Louisiana, this 17th day of August, 1973.

/s/ THOMAS H. REESE
Thomas H. Reese,
Circuit Executive for
The Judicial Council,
Fifth Circuit

The following Judges comprised and acted as the Reviewing Panel:

(a) *Fifth Circuit Judicial Council*

John R. Brown
John Minor Wisdom
Walter P. Gewin
Griffin B. Bell
Homer Thornberry
James P. Coleman
Irving L. Goldberg
Robert A. Ainsworth, Jr.
John C. Godbold
David W. Dyer
Bryan Simpson
Lewis R. Morgan
Charles Clark
Paul H. Roney
Thomas G. Gee

(b) *United States District Judge*

/s/ FREDERICK J. R. HEEBE
Frederick J. R. Heebe
Chief Judge
Eastern District of
Louisiana

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

March 8, 1976

TO ALL COUNSEL OF RECORD

No. 75-1530 — USA v. Bernard A. Horton

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

/smg
cc: Mr. George W. Reese
Ms. Mary W. Cazalas

Supreme Court, U. S.
FILED
JUN 28 1976
MICHAEL RODAK, JR., CLERK

No. 75-1567

In the Supreme Court of the United States

OCTOBER TERM, 1975

BERNARD A. HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

ROBERT E. LINDSAY,
DONALD R. ANDERSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1567

BERNARD A. HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A 1a-10a) is reported at 526 F.2d 884.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1976 (Pet. App. A 1a), and a petition for rehearing was denied on March 8, 1976 (Pet. App. E 26a). The petition for a writ of certiorari was filed on April 27, 1976 and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's jury selection plan violated the Jury Selection and Service Act of 1968, 28 U.S.C.

1861, *et seq.*, or petitioner's Sixth Amendment rights by excusing from jury service, upon individual request, persons actively engaged in the operation of a one-man business.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of willfully filing false income tax returns for the years 1968-1970, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent two year terms of imprisonment, the first six months to be served in prison, and the remainder to be suspended, followed by two years' probation. The court also ordered petitioner to pay the federal income taxes due (Pet. App. B 11a-12a). The court of appeals affirmed (Pet. App. A 1a-10a).

The jury was selected pursuant to the district court's "Plan for Random Selection of Grand and Petit Jurors Pursuant to the Jury Selection and Service Act of 1968" (Pet. App. D 14a-25a). As required by that Act (28 U.S.C. 1863), the Plan was approved by a reviewing panel consisting of the members of the Judicial Council of the Circuit and the Chief Judge of the District. The Plan provides a method of random selection of names for inclusion in a master jury wheel (Pet. App. D 24a-25a).

The names are drawn from voter registration lists (supplemented by subsequent registrants to the latest practicable date) from all parishes within the district. Names are then drawn by random selection from the master jury wheel and qualification forms are sent to the persons selected. After the forms are returned, the names of those persons qualified for jury service and not exempt or excused from such service under the Plan are placed in a qualified jury wheel, from which grand and petit jury panels are selected (Pet. App. D 16a-21a).

In addition to exempting certain categories of persons from jury service and specifying other grounds upon which a person may be excused after he has been summoned for a panel, the Plan states (Pet. App. D 21a):

> EXCUSES ON INDIVIDUAL REQUESTS
>
> This Court, by unanimous agreement of all of its judges, hereby finds that jury service by members of the following occupational classes or groups of persons would entail undue hardship or extreme inconvenience to the members thereof, and the excuse of such members will not be inconsistent with the objects and purposes of the Act, and shall be granted upon individual request:
>
> (1) Persons actively engaged in the operation of a one-man business.
>
> (2) Mothers with children under ten years of age where there is no one but the mother to take care of the children.
>
> (3) Attorneys at law, doctors and dentists actively engaged in the practice of their profession, and ministers of the Gospel actively and regularly engaged in the discharge of their ministerial duties.

If a person actively engaged in the operation of a one-man business requests to be excused from jury service on the juror qualfication form, his name is not placed in the qualified jury wheel, and he will not be summoned for service on a grand or petit jury panel (Pet. App. D 23a).

In affirming petitioner's conviction, the court of appeals rejected his challenge to the district court's jury selection plan on the ground that it excused the operators of "one man" businesses from jury duty upon request (Pet. App. A 9a-10a).

ARGUMENT

1. Petitioner challenges the plan pursuant to which the jury was selected in his criminal trial because it permitted persons actively engaged in the operation of a one-man business to be excused from jury duty upon request. But the Jury Selection and Service Act of 1968, 28 U.S.C. 1863(b)(5), provides that a plan shall "specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service * * * if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title." The pertinent legislative history cites sole proprietors as a group which a plan may excuse upon individual request under this section of the Act. See S. Rep. No. 891, 90th Cong., 1st Sess., p. 28 (1967); H.R. Rep. No. 1076, 90th Cong., 2d Sess., p. 11 (1968). See also *United States* v. *Grey*, 355 F. Supp. 529, 531-532 (W.D. Okla.). Provisions in a jury selection plan for the excuse of such individuals are common. *United States* v. *Gurney*, 393 F. Supp. 688, 705 (M.D. Fla.) ("plans of at least thirty districts * * * provide for the granting of excuses to sole proprietors").

Contrary to petitioner's unsupported assertion, there is no basis to conclude that the excuse, upon request, of those persons actively engaged in the operation of a one-man business would significantly affect a defendant's "right to grand and petit juries selected at random from a fair cross section of the community" (28 U.S.C. 1861). The excuse, upon request of certain classes of persons, does not deny citizens the "opportunity to be considered for service on grand and petit juries" (28 U.S.C. 1861) or exclude them from such service "on account of race, color, religion, sex, national origin, or economic status" (28

U.S.C. 1862). The challenged provision of the plan provides the "play in the joints of the jury-selection process * * * necessary in order to accommodate the practical problems of judicial administration" permitted by the Act. *Hamling* v. *United States*, 418 U.S. 87, 138.

2. The jury selection plan complies with the Sixth Amendment to the Constitution. That provision's guarantee of an impartial jury requires a "presence of a fair cross section of the community" on the lists from which juries are drawn, which may not be achieved "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Taylor* v. *Louisiana*, 419 U.S. 522, 526, 530. The district court's plan does not automatically exclude persons actively engaged in the operation of a one-man business from the qualified jury list but only excuses them upon their request. Moreover, there is no evidence that the frequency with which operators of one-man businesses are thus excused from jury service impermissibly restricts the qualified jury wheel to only special groups in the community. Nor does it systematically eliminate "segments playing major roles in the community" (*Taylor* v. *Louisiana, supra*, 419 U.S. at 530) or "easily identifiable groups," which requires "the aid of the courts in securing equal treatment under the law" (*Hernandez* v. *Texas*, 347 U.S. 475, 478).

Indeed, it has long been recognized that classes may be excluded, not merely excused, from the jury pool "on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted," particularly when the "nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act." *Rawlins* v. *Georgia*, 201 U.S. 638, 640. See *Taylor* v. *Louisiana, supra*, 419 U.S. at 534; *Government of the Canal Zone* v. *Scott*, 502 F.2d 566,

569 (C.A. 5). Excusing from jury service potential jurors "for whom jury service would entail an undue financial hardship" is permissible even though as members of a class constituting "a very substantial portion of the community" they may not be "intentionally and systematically excluded" from the jury system. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223, 224. The constitutionally mandated "fair-cross-section principle must have much leeway in application." *Taylor* v. *Louisiana, supra,* 419 U.S. at 538.

Thus, qualifications for jurors, exemptions, and excuses are not prohibited "so long as it may be fairly said that the jury lists or panels are representative of the community." *Taylor* v. *Louisiana, supra,* 419 U.S. at 538. The jury lists and panels in this case met that standard.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

ROBERT E. LINDSAY,
DONALD R. ANDERSON,
Attorneys.

JUNE 1976.